IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948.

No. 206 MISC.

Ex Parte JOSEPH COLLETT,
Petitioner.

MOTION FOR LEAVE TO FILE PETITION FOR ORDER TO SHOW CAUSE WHY WRITS OF MANDAMUS AND PROHIBITION SHOULD NOT ISSUE, AND PETITION FOR SAME.

LLOYD T. BAILEY,
325 Thompson Building,
Hot Springs, Arkansas.

MICHAEL H. LYONS,
105 W. Madison Street,
Chicago, Illinois,

THEODORE GRANIK,
1627 K Street,
Washington, D. C.,
Counsel for Petitioner.

Midwest Law Printing Co., 340 W. Huron St., Chicago

The Questions Involved.

Importance.

PAGE

1. Does Section 1404a, Title 28, U. S. C. A., effective September 1, 1948, a general statute, amend and supersede the special venue provision in Section 6 of the "Federal Employers' Liability Act", Title 45, Section 56, U. S. C. A.?

2. Did the court below, erroneously deny plaintiff the right of venue expressly conferred by the Federal Employers' Liability Act?

3. Importance:

   (a) More than 1,350,000 railroad men, not including their families, their widows and orphans, are and are likely to be put in grave and imminent danger of losing substantial rights by having cases transferred to venues not of their choice.

   (b) A vast number of cases brought under the F. E. L. A. are being, and will be transferred by district judges, leaving the injured, widows and orphans, without relief as to their venue, unless it be by extraordinary proceedings such as this.

   (c) Unless the court accepts this petition, this plaintiff, and a vast number of other plaintiffs, will be compelled to petition, and be involved in litigation in two U. S. courts of appeal. Eventually, this court will be called upon to decide the question.

Motion:

The Questions Involved 1

Importance 2

PAGE

Petition:
Preliminary Statement 5
This Court has power to issue writs. Cases cited 6
Summary of Facts 6
Lower Court's basis for transferring case ..... App. 23
Affidavit of Lloyd T. Bailey 9

Memorandum in Aid of Petition 10
Discussion of Importance 10
Section 6 of the Federal Employers' Liability Act confers substantive rights to railroad men injured while working in interstate commerce by railroad. Cases cited 10
As a general statute, the code revision cannot supersede the specific statutory venue enactment of the Federal Employers' Liability Act. Cases cited 12
Section 6 of the Federal Employers' Liability Act was not repealed by Section 39 of Chapter 647, Public Law 773 10-22
Congress did not intend to repeal the special venue section of the Federal Employers' Liability Act by enactment of Section 1404a of Title 28, U. S. C. A. 18
Concurrent history of congressional action on the Jennings Bill 21

INDEX OF CASES CITED.

B. & O. R. Co. v. Kepner, 314 U. S. 44-54 11

Hohorst, The Matter of, 150 U. S. 653 17

Miles v. Illinois Central R. R., 315 U. S. 698 11

In re National Labor Relations Board, 304 U. S. 486 6

Ex Parte Republic of Peru, 318 U. S. 578 6

PAGE

Scripps-Howard Radio, Inc. v. Federal Communications Commission, 318 U. S. 4 6

U. S. Alkali Export Ass'n v. U. S., 325 U. S. 196 12

U. S. v. National City Lines, 92 L. Ed. 1115 13

Washington v. Miller, 235 U. S. 422 12

Congressional Record. (Excerpt) 18-20

Federal Employers' Act, Sec. 6, 45 U. S. C. A. 56 10

Jennings Bill. (Consent) 21

U. S. C. A., Title 83, 1404a 5

Appendix:

Order of Lower Court transferring case 23-26

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948.

No.

Ex Parte JOSEPH COLLETT,
Petitioner.

MOTION FOR LEAVE TO FILE PETITION FOR ORDER TO SHOW CAUSE WHY WRITS OF MANDAMUS AND PROHIBITION SHOULD NOT ISSUE, AND PETITION FOR SAME.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner in the above entitled matter respectfully moves the court for leave to file the attached petition for an order direct to the United States District Court for the Eastern District of Illinois, and directed to the Honorable Fred L. Wham, United States District Judge for the Eastern District of Illinois, East St. Louis, Illinois, to show cause why a writ of mandamus should

not issue from this court directing the said court and judge to vacate and expunge from the records of said court, certain orders made and entered in the case of *Joseph Collett, plaintiff* v. *Louisville and Nashville Railroad Co., defendant,* No. 1532, in said district, (wherein it was stipulated for the record that both plaintiff and defendant were subject to and working under the provisions of the Federal Employers' Liability Act at the time of the injuries); and for an order directed to the United States District Court for the Eastern District of Kentucky, and directed to the Honorable H. Church Ford, United States District Judge for the Eastern District of Kentucky, to show cause why a writ of prohibition should not issue from this court directing said court and judge to stay all proceedings in said cause and for an order to re-transfer said cause to the United States District Court for the Eastern District of Illinois, being cause No. 59 in said District Court.

The order of the District Court for the Eastern District of Illinois, transferring said cause to the Eastern District of Kentucky, was entered upon the hypothesis that Section 1404a, Title 28, U. S. C. A., effective September 1, 1948, amended, repealed and superceded Section 6, of the Federal Employers' Liability Act, Section 56, Title 45, U. S. C. A., and therefore said order, as petitioner believes, is void.

Your petitioner would therefore respectfully represent to this court that as he believes, the interlocutory order entered transferring said cause was not appealable, and that before an ordinary appeal could be taken to this court, petitioner's case would necessarily have been tried in a venue not of his selection, (in the City of Richmond, Kentucky, a farming community, with a population of

7,335), instead of in a metropolitan area, (in the City of East St. Louis, Illinois, having a population of 74,024), would have lost substantial rights and an appeal would be without point; that plaintiff's only remedy is by this or some such extraordinary proceeding.

Petitioner respectfully prays leave to file the attached petition and for all just, right and proper relief.

Joseph Collett,
Petitioner.

Lloyd T. Bailey,
325 Thompson-Building,
Hot Springs, Arkansas.

Michael H. Lyons,
105 W. Madison Street,
Chicago, Illinois.

Theodore Granik,
1627 K Street,
Washington, D. C.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948.

No.

Ex Parte JOSEPH COLLETT,
Petitioner.

PETITION FOR ORDER TO SHOW CAUSE WHY WRITS OF MANDAMUS AND OF PROHIBITION SHOULD NOT ISSUE, AND MEMORANDUM IN SUPPORT THEREOF.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.

PRELIMINARY STATEMENT

This petition is respectfully submitted for the purpose of enabling the court to pass upon the conflict in jurisdiction and venue now existing as a result of the action of the District Court for the Eastern District of Illinois, sitting at East St. Louis, Illinois, ordering plaintiff's case transferred from the Eastern District of Illinois to the Eastern District of Kentucky. The lower court based its authority for the order of transfer on the hypothesis that Section 6 of the "Federal Employers' Liability Act," (Section 56, Title 45, U. S. C. A.) was repealed or amended by the enactment of Section 1404a (Chapter

87, Title 28, U. S. C. A.), of the new Federal Judicial Code.

This Court Has Power to Issue All Necessary Writs in Aid of Its Appellate Jurisdiction.

The Supreme Court is empowered, by Section 262 of the Judicial Code (28 U. S. C. A. 377) and after September 1, 1948 by Title 28, U. S. Code, Section 1651; to issue all writs necessary or appropriate in aid of its appellate jurisdiction agreeable to the usages and principles of law.

The supervisory power of this Court under this statute over a district judge was affirmed in *Ex Parte Republic of Peru*, 318 U. S. 578, where the Court pointed out that the writs afford an expeditious and effective means of confining the inferior court to a lawful exercise of its prescribed jurisdiction.

To the same effect see also *Scripps-Howard Radio, Inc. v. Federal Communications Commission*, 316 U. S. 4; *In Re National Labor Relations Board*, 304 U. S. 486.

SUMMARY OF FACTS.

The plaintiff, who is 36 years old, married, and the father of four minor children, was injured on May 30, 1947, while employed by the defendant as a car oiler, or inspector's helper, at about 5:30 A. M., when he was caused to lose his balance and fall under a moving train he was about to assist in inspecting, due to the alleged negligence of defendant in failing to furnish plaintiff a reasonably safe place in which to work.

Both legs were amputated close to his body. It was stipulated for the trial that plaintiff could never wear

artificial limbs and that both the plaintiff and defendant were employed in interstate commerce, at the time of the injury.

Both plaintiff and his wife are illiterate, neither being able to read nor write beyond the signing of their names. On July 28, 1947, two days after plaintiff left the hospital, defendant paid him $8,000.00, and took a release from him in full settlement of his claim.

On September 2, 1947, plaintiff employed counsel, who filed suit for him in October, 1947, in the District Court for the Eastern District of Illinois (sitting at East St. Louis, Illinois) alleging among other things, fraudulent procurement of the release.

East St. Louis, Illinois, is situated on one of the main lines of the defendant's railroad and is 428 miles distant from Irvine, Kentucky, where the accident occurred, and where plaintiff lives. The case was set for trial on February 16, 1948, but was adjourned to the May term due to the plaintiff's illness. At the May term, the case was set for trial on November 1, 1948. In the interim, the court ordered plaintiff to tender to the defendant railroad the $8,000.00, he had received in settlement, on penalty of dismissal of his case. The tender was made although plaintiff was compelled to borrow more than 50 per cent of the money.

On September 22, 1948 defendant filed its "Motion for Change of Venue," asking that the case be transferred to the Eastern District of Kentucky, by virtue of Section 1404a, Chapter 87 of Title 28 U. S. C. A. effective September 1, 1948. On October 18, 1948 the court granted defendant's motion and transferred the case to the Eastern District of Kentucky to which action the plaintiff

reserved an exception, and this petition is brought for the purpose of setting aside and revoking that order.

Plaintiff brought this action under the provisions of the "Federal Employers' Liability Act," Title 45, Sections 51-60.

Effective September 1, 1948, Title 28 of the United States Code (Judiciary and Judicial Procedure) was recodified and revised, and Section 1404, Subdivision (a) of this revision provides as follows:

"'§1404. Change of Venue.

(a) For the convenience of parties and witnesses, in the interest of justice, a District Court may transfer any civil action to any other district or division where it might have been brought."

The lower court based its authority for the transfer of petitioner's case upon the quoted section of the Revised Code (see Appendix, page 23) and on the theory that said section superseded Section 6, the specific venue provision, of the Federal Employers' Liability Act. This petition is submitted generally in opposition to that theory, and in support of the contention that said section has no application to actions brought under the Federal Employers' Liability Act.

Wherefore, petitioner prays for the issuance of a writ of mandamus to the District Court for the Eastern District of Illinois, directing that it revoke and expunge from the record, its order of October 18, 1948, transferring said cause to the Eastern District of Kentucky, and for a writ of prohibition to the District Court for the Eastern District of Kentucky, preventing it from proceeding with

the trial of said cause on the grounds that it is without jurisdiction over said action.

Respectfully submitted,

Joseph Collett,

Petitioner.

Lloyd T. Bailey,
Michael H. Lyons,
Theodore Granik,
Counsel for Petitioner.

State of Illinois)
County of Cook)

Affidavit.

I hereby certify that on this 9th day of November, 1948, before me, Madeline B. Dworzak, a notary public, duly commissioned and qualified for the State of Illinois and County of Cook, personally appeared Lloyd T. Bailey, one of the attorneys for the petitioner herein, and made oath in due form of law that he is authorized to make this affidavit on behalf of the petitioner and that the facts entered in the foregoing petition are true in substance and in fact as he verily believes.

Witness my hand and notarial seal the day and year first above written.

Madeline B. Dworzak,
Notary Public.

(SEAL)

MEMORANDUM IN AID OF PETITION.

We feel that it is of the utmost importance that petitioner's motion be allowed.

Many cases brought under the Federal Employers' Liability Act have already been transferred by various judges of the district courts and many petitions for transfer are now pending in such courts; thus hundreds of men injured in railroad accidents, their widows and orphans, are put in grave and imminent danger of losing substantial rights by having their cases transferred to venues other than their choice. These unfortunates are wholly without remedy, unless it be by extraordinary means.

Unless this court, which will eventually be called upon to decide the question, in the exercise of its discretion, allows plaintiff's motion, or some such motion, the injured railroad men or their families are faced with the necessity of petitions for mandamus and prohibition in two United States courts of appeal with attending delay, expense and the possibility of conflicting decisions.

Section 6 of the Federal Employers' Liability Act Confers Substantive Rights to Railroad Men Injured While Working in Interstate Commerce By Railroad.

Under Section 6 of the act of Congress of April 5, 1910, as amended, (45 U. S. C. A., § 56), a special venue provision for Federal Employers' Liability Act cases is provided, reading as follows:

> "Under this chapter, an action may be brought in the District Court of the United States, in the district of the residence of the defendant, or in which

> the cause of action arose, or in which the defendant shall be doing business at the time of the commencement of action."

After 38 years of extensive litigation in both Federal and State Courts, a contemporary interpretation of this section has been accomplished under which the courts now uniformly recognize that the section gave to the employees a definite, valuable substantive right.

In *Baltimore & Ohio R. Co.* v. *Kepner* (1941), 62 S. Ct. 6, 314, U. S. 44, 86 L. Ed. 28, the Supreme Court considered the special venue statute of the Federal Employers' Liability Act and held that Section 6, (Title 45, U. S. C. A. 56), established the venue for the action in the federal courts, stating on page 33, 86 L. Ed.:

> "When the section was enacted, it filled the entire field of venue in Federal Courts. A privilege of venue granted by the legislative body which created this right of action cannot be frustrated for reasons of convenience or expense. If it is deemed unjust, the remedy is legislative, a course followed in securing the amendment of April 5, 1910, for the benefit of employees."

In *Miles* v. *Illinois Central R. R. Co.*, 315 U. S. 698 (1942), the selection of the forum by the representatives of the injured employee was a state court and an injunction was issued against the maintenance of the suit on the grounds of *forum non conveniens* and although the State Court had established authority for enjoining oppressive litigation, the majority opinion made it clear that the act of the Congress, (Section 6 of the Federal Employers' Liability Act), at page 705 is:

> "A determination that the state courts may not treat the normal expense and inconvenience of trial in permitted places, such as the one selected here, as inequitable and unconscionable."

In this case, therefore, we see both substantive and adjective statute authorizing an interference with the selection of venue under the F. E. L. A., and yet the Supreme Court clearly says that the venue provision of the act has the same effect as a pre-determination, that selection of forum can never be inequitable and unconscionable.

As a General Statute, the Code Revision Cannot Supersede the Specific Statutory Venue Enactment of the Federal Employers' Liability Act.

The presumptions of statutory construction support the proposition that Section 1404(a), as part of a codification or statutory revision, does not supersede Section 6 of the Federal Employers' Liability Act, a special statutory enactment as interpreted by the courts.

It is an elementary tenet in reconciling such general codifications with pre-existing special statutes, not only that the general provisions, without express words of repeal, do not effect the previous special act, but that if the terms of the general act are broad enough to include the cases embraced in the special or local act the general act is to be construed as to have no application or effect upon the special act. In such case the special act is to be deemed an exception to the general act. See

U. S. Alkali Export Association v. *United States*, 325 U. S. 196 (1945), and cases cited.

In *Washington* v. *Miller*, 235 U. S. 422 (1914), a statutory situation of substantially identical nature was presented to the Supreme Court. The suit there involved title to land claimed by opposing claimants, each alleging heirship to a deceased Creek Indian. The conflict arose by reason of a difference in the laws of descent

and distribution of the Creek nation and the State of Arkansas. Special statutes had been enacted in 1902 making Creek distribution applicable, but in 1904 an Act was passed as follows:

> "All the laws of Arkansas heretofore put in force in the Indian territory are hereby continued and extended in their operation so as to embrace all persons and estates in said territory, whether Indian, freedmen or otherwise."

There was no repealing clause of the previous Act. Clearly, if this statute was read literally, it would subject the Creek laws to the Arkansas laws of descent and distribution. The court pointed out (page 428) that such a result would only be by reason of the generality of its terms for it made no mention of that law. The court said:

> "In these circumstances we think there was no implied repeal and, for these reasons, first, such repeals are not favored, and usually occur only where there is such an irreconcilable conflict between an earlier and a later statute that effect reasonably cannot be given to both (citing cases); second, where there are two statutes upon the same subject the earlier being special and the later general, the presumption is, in the absence of an express repeal or an absolute incompatability, that the special is intended to remain in force as an exception to the general (*Townsend* v. *Little*, 109 U. S. 504, 512; *Ex parte Crow Dog*, Id. 556, 570; *Rodgers* v. *Texas*, 185 U. S. 83, 87-89); and, third, there was in this instance no irreconcilable conflict or absolute incompatability for both statutes could be given reasonable operation if the presumption just named were recognized."

We would like to call the court's attention to a recent case decided by this court June 7, 1948, *United States* v. *National City Lines*, 92 L. Ed. 1115, in which this court

had under consideration the special venue provision of the Clayton Anti-Trust Act, a venue statute similar to the one found in Section 6, of the Federal Employers' Liability Act. This court held that the doctrine of forum non conveniens was not applicable because of the special venue section of the act.

Section 39 of Chapter 647, Public Law 773, which was the actual law enacting Title 28, reads as follows in pertinency:

> "The sections or parts thereof of the * * * revised statutes of the United States or statutes at large enumerated in the following schedule are hereby repealed * * *."

There then follows approximately 23 pages representing the schedule of laws repealed. Section 6 of the Federal Employers' Liability Act was not repealed, so that there is clearly not the necessary, definite expressed intention to supersede or repeal the special statute required by the elementary rules of construction referred to.

Where the legislature did intend to make Section 1404(a) applicable to other special statutes containing their own venue provisions, it did so in a clear and unmistakable manner. For example, in order to make it clear that the transfer procedure was to apply to copyright cases Section 111 of Title 17, which established venue for copyright actions, was specifically repealed. The repealer is found in the statutes referred to and the venue provision is then restated right in the revision of Title 28 as Section 1400(a) in the chapter denominated "Chapter 87—District Courts; Venue".

In Title 40 was found Section 257, which was the venue provision for condemnation proceedings. The venue provision was specifically repealed, the section appears in

the list of statutes repealed above referred to, and the venue provision became Section 1403, again a part of Chapter 87, referring to venue in district courts.

And so we find assembled in that chapter the venue provisions for banking association actions (28 U. S. C. A. 1394), the venue provisions for recovering fines, penalties and forfeitures (1395), the venue provision for recovering Internal Revenue taxes (1396), the venue provision covering interpleader (1397), the venue provision covering enforcement of Interstate Commerce Commission orders (1398), the venue provisions covering partition actions involving the United States (1399), the venue provision covering stockholders derivative actions (1401), and the venue provision covering actions against the United States under the Tort Claims Act (1402).

These then (the venue provisions re-enacted in Chapter 87) are all of the civil actions which the court may transfer for the convenience of parties and witnesses, as authorized by Section 1404(a).

The omissions are significant. Beside the omission of the venue provision of the Federal Employers' Liability Act, it will be observed that the special venue provisions of the Sherman Anti-Trust Act and of the Jones Act are excluded. They were not overlooked.

It is almost self-evident that in the case of the Jones Act (46 U. S. C. A. 688), the Anti-Trust Laws (15 U. S. C. A. 1 to 7) and the Federal Employers' Liability Act there were reasons of substance for not including these venue provisions.

There is ample external evidence to support the contention that the inclusion or absence of the venue provisions of other Acts in the list of statutes repealed and

their reenactment in Chapter 87 of Title 28, is the criterion for determining whether Section 1404(a) is or is not to apply to such venue choice. In House Report No. 308 of the 80th Congress, First Session, which accompanied H.R. 3214, it was said:

> "Sections 35 and 36* (which contained the schedule of laws repealed) provided for the specific repeal of all laws incorporated in the revision and other superseded and obsolete provisions relating to the courts. The schedule was carefully checked and rechecked many times. *This method of specific repeal will relieve the courts of the burdensome task of ferreting out implied repeals.*" (Italics ours.)

Furthermore, when amendments of sections in other titles were indicated to conform with the provisions of the revision, these amendments were set forth in Sections 3 to 31 of the law and in the same report it was said:

> "Sections 3 to 31 are amendments of sections in titles other than Title 28 which will make such sections *conform* with provisions of this revision."

It would seem to follow that where a section or provision, such as that with respect to venue in 45 U. S. C. A. 56, is not amended it was not intended that that section or provision should "conform" with the provisions of the revision.

As will be hereafter observed, Title 28 was represented as a codification containing nothing of a controversial nature. If the United States Attorney believed that a civil action brought pursuant to the Sherman Anti-Trust Act could be transferred at the instance of a defendant to another district, subject to prosecution by a different office of the United States Attorney than that in which his action had been commenced, strenuous objections

* Section 39 now provides for repeals. See Senate Report No. 1559.

would have been made. It would have been indeed the subject of the greatest controversy had the revision been drafted so as to repeal and re-enact the venue provisions of the Jones Act and the Federal Employers' Liability Act in Chapter 87, thereby making actions brought pursuant to these two statutes transferable to other districts, and this was a fact that was very well known to the committee of the House and Senate and the revisers having the stewardship of the revision.

There is ample authority for limiting 1404(a) to the venue situations set forth in Chapter 87.

The *Matter of Hohorst*, 150 U. S. 653 (1893), which construed the predecessor to the general venue provision in Title 28, is authority for the proposition that general venue provisions are inapplicable to specific situations unless specifically covered, and there it was held that a foreign corporation could be sued in any district where it might be found despite the distinct inhibitions of the then venue statute limiting suits to the district of residence of either the plaintiff or the defendant.

The legislation covering the rights and liabilities between railroads and their employees for personal injury has been systematically revised, restated and strengthened through the years, and the courts have consistently found in this legislation the intention to bestow special advantages in matters of venue upon injured railroad employees and have given to the Acts and amendments an interpretation designed to carry out its humanitarian objectives. An intention to depart from that policy thus declared and so deliberately settled for nearly 40 years is not to be assumed on any casual basis, and certainly not when the process requires a disregard of one of the most elementary and best established principles of statutory construction.

Congress Did Not Intend to Repeal the General Venue Section of the Federal Employers' Liability Act by Enactment of Section 1404a of Title 28, U. S. C. A.

When the revision was finally completed it was presented to both the House and Senate via the consent calendar, rules were suspended and the Bill passed practically without opposition. With this background in mind, the comments of Senator Donnell of Missouri, who presented the Bill to the Senate, are of importance in ascertaining both the knowledge which the Senators had at the time they voted on this Bill and their intent in voting for it. The Senate floor discussion which took place on June 12, 1948 is in 94 Congressional Record 8108-8111 and is also reported beginning at page 2019 of the supplement to Title 28. Senator Hatch asked for a brief explanation of the Bill and Senator Donnell of the Senate Judiciary Committee stated that its purpose was to "codify and revise the laws relating to the federal judiciary and judicial procedure". Thereafter, Senator Robertson of Virginia said:

> "The Bill presents this codification as a thoroughly expert *codification of existing law; does it not?*"

Senator Donnell said, in reply:

> "The purpose of this Bill is primarily to revise and codify and to enact into positive law with such corrections as were deemed by the Committee to be of substantial and *non-controversial nature.*" (Supplement, page 2020.) (Italics ours.)

The court will note that the Act was represented to the Senate as containing corrections of a noncontroversial nature.

Charles J. Zinn, Esq., was counsel for the House Committee on Revision of the Laws. A hearing was held before Sub-Committee No. 1 of the House Judiciary Com-

mittee on the revision on March 7, 1947. Mr. Zinn said (page 1981):

> "People who are afraid that we are changing the law to a great extent need not worry particularly about it."

Congressman Keogh, who was Chairman of the Committee which originally had charge of the Bill, said at this same hearing before the Sub-Committee:

> "The policy that we adopted, which in my mind has been very carefully followed by the revisers and by the staffs of the publishing companies, as well as the employees of the committee, was to avoid wherever possible and whenever possible the adoption in our revision of what might be described as *controversial substantive changes of law.*" (p. 1945 of Title 28 Supplement)
>
> "Mr. Chadwick: Mr. Keogh, I gathered from the very able presentation of the background of your approach that it is probably undesirable at this time for us to consider changes of the substantive laws that either are or might become controversial. This is not the time for that particular type of contribution. Am I correct?
>
> Mr. Keogh: You are correct. * * * But, further, we proceeded upon the hypothesis that since that was primarily a restatement of existing law, we should not endanger its accomplishment by the inclusion in the work of any highly controversial changes in the law."
>
> "Mr. Robsion: And this bill does not include controversial matters?
>
> Mr. Keogh: We have sought to avoid as far as possible, Mr. Chairman, any substantive changes that did not meet with unanimity of opinion." (P. 1950 of Title 28 Supplement.)
>
> (Congressman Chadwick did not vote on, and Congressman Keogh voted against, the Jennings Bill; Cong. Rec., 80th Cong., 1st Sess., Vol. 93, No. 137, P. 9369, July 17, 1947.)

Members of Congress would not read a bill as lengthy and extensive as this one. They would rely upon the assurance that it contained no controversial matters. At the same Hearing these remarks were made:

By Congressman Robsion, Chairman.

> "So the important thing that this committee is trying to accomplish is to develop such a table so that the Members of Congress will feel that what we present to them is as nearly correct as work of this kind can be made correct, *because you can never reach a time when the Members of Congress will read a bill like that* and then turn to all the hundred and hundreds of references, the various statutes, to see whether they are correct, or have been repealed, * * *" (P. 1941, Title 28 Supplement.)

(Congressman Robsion voted against the Jennings Bill; Congressional Record, *supra.*)

In a communication, made part of the record of the Committee Hearing, Circuit Judge Sanborn stated:

> "Any departures from the strict letter of existing statutes have been carefully noted by the revisers, and *represent improvements of a non-controversial character.*" (P. 1972, Title 28, Supplement.)

The Senate Report has well emphasized the non-controversial nature of the revision. In Senate Report 1559, 80th Congress, Second Session, which accompanied the Bill, it was said (page 1676 of Supplement to Title 28):

> "Many *non-controversial* improvements have been affected which, while individually small in themselves, add up to a very substantial improvement in and *modernization of the law relating to the federal judiciary. At the same time great care has been exercised to make no changes in the existing law which would not meet with substantially unanimous approval.*" (Italics ours.)

Counsel does not subscribe for a single moment to the proposition that the revisers, Mr. Zinn, Congressman

Keogh, Congressman Chadwick, Congressman Robsion, Congressman Devitt, Circuit Judge Sanborn and Senator Donnell were attempting to mislead Congress as to the intent, purpose or effect of the revision. Their statements rather make it conclusive that 1404(a) of the revision was not intended to deprive the injured workman of his right to select and try his case in a forum of his choice.

Concurrent History of Congressional Action on the Jennings Bill.

The court will note that certain references have been made to the effect that Congressman Keogh and others, who endorsed the re-codification of Title 28, voted against the Jennings Bill. The Jennings Bill has been one of the highly controversial items on the legislative agenda of the last two sessions of Congress. In the Jennings Bill and various amendments offered from time to time, the proposal was to limit the choice of venue in actions against the railroads to more geographically restricted locations. Basically, this controversy has raged because it involved immeasurable sums of money to both the railroads and their injured employees.

The significant feature which underwrites the contention that 1404(a) of the revision was not intended to have application to Federal Employers' Liability Act cases is that these hearings were conducted under the auspices of the same Judiciary Committees in the same House, with the same personnel, at the same session of the House of Representatives; that the legislation was of the most highly controversial and inflammable nature; that it was never enacted into law, that in the debate on H. R. 1639 a minority report of the Judiciary Committee (Report 613, Part 2, 80th Congress, First Session, 1947) which

would have made the doctrine of *forum non conveniens* applicable to Federal Employers' Liability Act cases, was proposed and defeated. First Jennings Bill—H. R. 242, 79th Cong. (1947) Second Bill—H. R. 635, 79th Cong., 2nd Sess. Third Bill—H. R. 1639, 80th Cong. 1st Sess. (1947) 34 American Bar Association Journal, 341 (April 1948) 56 Yale Law Journal 1234.

CONCLUSION.

It is respectfully submitted that aside from the presumptions of statutory construction there is clear evidence of a statutory and congressional intention not to disturb those special rights and privileges found and reiterated by the Supreme Court to have been created by the Federal Employers' Liability Act from their special repository in Section 56 of Title 45 U. S. C. A.

Respectfully submitted,

LLOYD T. BAILEY,
325 Thompson Building,
Hot Springs, Arkansas.

MICHAEL H. LYONS,
105 W. Madison Street,
Chicago, Illinois.

THEODORE GRANIK,
1627 K Street,
Washington, D. C.,
Counsel for Petitioner.

APPENDIX.

IN THE DISTRICT COURT OF THE UNITED STATES
For the Eastern District of Illinois

JOSEPH COLLETT,
Plaintiff,
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY, a corporation,
Defendant.

Filed Oct. 18, 1948
D. H. Reed, Clerk

Civil—No. 1532

ORDER:

This case is pending before this Court, with the issues fully settled and having been set for trial. It is a case arising under the Federal Employers' Liability Act. Subsequent to the effective date, September 1, 1948, of the new Title 28, U. S. Code Judiciary and Judicial Procedure, which Act is entitled "An Act to Revise, Codify and Enact into Law Title 28 of the U. S. Code entitled Judicial Code and Judiciary, adopted June 25, 1948 and effective September 1, 1948, defendant filed in this cause its Motion entitled "Motion for Change of Venue" supported by Affidavits, asking this Court, in the exercise of its judicial discretion, for the convenience of the parties and witnesses, and in the interest of justice, to transfer this cause to the United States District Court for the Eastern District of Kentucky sitting either at Lexington or at Richmond, Kentucky.

Issues have been joined on said Motion on the part of the plaintiff by the filing of briefs and counter affidavits. The matter has been fully argued and is submitted to the Court for decision.

The record before the Court on this motion discloses that all of the witnesses in this case, including the plaintiff himself, reside at Irvine, Kentucky, which is twenty-six miles from Richmond and forty-eight miles from Lexington, Kentucky. The trial of the case will take approximately four days, and it is anticipated that approximately thirty-five witnesses will be used at the trial. Irvine, Kentucky is four hundred and twenty miles from East St. Louis, Illinois, where this case is set for trial, and journey by public transportation will require approximately twenty-four hours. The issue in the case, besides that of liability under the Federal Employers' Liability Act, also involves the validity of a release execute by plaintiff for a valuable consideration, which release has been attacked on the ground of fraud in the indictment.

The accident occurred in or near Irvine, Kentucky. The Louisville and Nashville Railroad Company is amenable to process in Richmond, Kentucky or in Lexington, Kentucky.

Defendant's Motion, which is really a Motion for the Transfer of the cause rather than a Motion for Change of Venue, is based upon Section 1404a of the Act above referred to. This section reads:

> "For the convenience of parties and witnesses, in the interest of justice, a District Court may transfer any civil action to any other District or Division where it might have been brought."

There is nothing in the Act which restricts the application of this language. There is nothing in the legislative history of the Employers' Liability Act or of this Act which excludes application of it to a Federal Employers' case. The legislative history both of the Federal Employers' Act and of this Act to the contrary indicates that the purpose of the passage of this Act was to enable the trial court to transfer the cause if in the interest of justice and for the convenience of parties and witnesses the exercise of judicial discretion so requires.

The fact that this case was instituted prior to the effective date of the Act is of no consequence. The Act effects only a matter of procedure, and there is no vested right in a matter of procedure. The fact that the case has been set for trial is of no consequence, in view of the fact that counsel for the defendant have stated in open court that they will co-operate in a setting of this case at the November Term 1948, either at Lexington or at Richmond, Kentucky. It appears from the record that the next calendar of jury cases at Richmond will be made up on November 8th, and that the next calendar of jury cases at Lexington will be in the month of January, 1949. Furthermore, the case would have been disposed of by this Court at the May Term, 1948 if plaintiff had not resisted defendant's motion to require him to make a tender of the consideration paid for the release.

The language of Section 1404a is unambiguous, direct, clear and by the language used in the history thereof, indicates that all civil actions are embraced within its scope, and nothing has been advanced by plaintiff in contradiction to the claim of defendant that it is to the convenience of the parties and the witnesses that the cause be transferred.

In view of the foregoing record exercise of sound judicial discretion requires that this cause be transferred for trial to the Eastern District of Kentucky, at Lexington, Kentucky.

It is therefore Ordered that this cause be and is hereby transferred to the United States District Court for the Eastern District of Kentucky, at Lexington, Kentucky, and that the Clerk of this Court shall forthwith forward all of the files in this proceeding to the Clerk of said District at Lexington, Kentucky, together with a copy of this order.

It Is Further Ordered that the Clerk of this Court forward to the Clerk of the District Court at Lexington, Bank Draft No. 293 of the Winchester Bank of Winchester, Kentucky, dated July 12, 1948, payable to the Louisville and Nashville Railroad Company, in the amount of $8,000.00, deposited with the Clerk of this Court as a tender to the defendant of the consideration paid for the release in accordance with the terms of an order of this Court theretofore entered thereon.

Exception is allowed to the plaintiff.

Dated at East St. Louis, Illinois, this 18th day of October, A. D. 1948.

By the Court.

(Signed) Fred L. Wham,
Judge.

Endorsed: No. 1532 Joseph Collett, Plaintiff v. Louisville & Nashville Railroad Company, Defendant. Order Transferring Cause. Harold Baltz, Otis E. Guynon, Attorneys for Defendant, 25 First National Bank Bldg., Belleville, Illinois.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948.

No. 206 Miscellaneous

Ex Parte JOSEPH COLLETT,
Petitioner

JOSEPH COLLETT,
Petitioner,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
Respondent.

MEMORANDUM IN REPLY TO BRIEF OF RESPONDENT.

LLOYD T. BAILEY,
325 Thompson Building,
Hot Springs, Arkansas,

MICHAEL H. LYONS,
105 W. Madison Street,
Chicago, Illinois,

THEODORE GRANIK,
1627 K Street,
Washington, D. C.,
Counsel for Petitioner.

Midwest Law Printing Co., 340 W. Huron St., Chicago

INDEX.

Statement of Case.

	PAGE
I. Should Petitioner have sought relief in two Circuit Courts of Appeal?	2
II. Questions of Importance	3
III. This Court has Jurisdiction	6
IV. Petitioner had no Right of Appeal	7
V. Does Section 1404(a), Chapter 28, U.S.C.A., affect Chapter 6 of the Federal Employers' Liability Act?	7
Excess judicial power was exercised by the District Court in transferring Petitioner's case 13 days before the set trial date	12

Table of Cases Cited.

In Re Chetwood, Petitioner, 17 S. Ct. 385, 165 U. S. 443	4
Ex Parte Crow Dog, 109 U. S. 556, 570	9
Pascarella v. New York Cent. R. Co., 81 F. Supp. 95	7, 10
Rogers v. Texas, 185 U. S. 83, 87-89	9
Townsend v. Little, 109 U. S. 504, 512	9
Vaughan v. Expresas Hondurenas, S. A., 171 F. 2nd 46	11
Washington v. Miller, 235 U. S. 422, 428	9

House Resolution 1639 (Jennings Bill) 9

Moore's Federal Practice (Second Edition) Volume 3 8-9

United States Code

Title 28, Sec. 1391 8

Title 28, Sec. 1400 8

Title 28, Sec. 1404(a) 7, 10, 11

Title 28, Sec. 1445(a) 7, 8

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948.

No. 206 Miscellaneous

Ex Parte JOSEPH COLLETT,
Petitioner

JOSEPH COLLETT,
Petitioner,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,

MEMORANDUM IN REPLY TO BRIEF OF RESPONDENT.

STATEMENT.

On January 26, 1949, petitioner received through the United States mail from Woodward, Hobson and Fulton, attorneys in Louisville, Kentucky, a brief, entitled, "Brief Of The Respondent, Honorable Fred L. Wham, U. S. District Judge, etc." A brief in opposition to a motion for leave to file petition for order to show cause why writs of mandamus and prohibition should not issue in this case. In order that the court may have a

fair perspective of the situation we suggest that the Honorable Fred L. Wham is not the true respondent in this case but that the Louisville and Nashville Railroad Company is, in fact, the true respondent. The Honorable Robert P. Hobson, whose name appears among the attorneys on respondent's brief, personally appeared in the district court of the Honorable H. Church Ford, District Judge for the Eastern District of Kentucky and personally appeared and opposed petitioner's motions first, to dismiss said cause, which motion was overruled, and, secondly, to stay proceedings in said court pending the outcome of the case at bar, which motion was granted. Members of the firm of Woodward, Hobson & Fulton, whose names appear on respondent's brief, are listed as counsel for the Louisville and Nashville Railroad Company in Martindale-Hubbell Law Directory—1948 Edition, volume I, page 889.

Respondent sets out five reasons why petitioner's motion should not be allowed We will consider said reasons in their proper order and under their exact headings in respondent's brief on pages 2 and 3 of said brief.

I.

Petitioner has made no proper application for the same relief to the Court of Appeals for the Seventh Circuit and to the Court of Appeals for the Sixth Circuit.

Respondent, in urging this proposition upon the Court, emphasizes the reasons why, in the interest of justice, expedition in settling the question in controversy and in the saving of the time of many courts with the attending expense, why this court should allow petitioner's motion. The reason that petitioner did not first seek redress in two separate courts of appeal, with attending

expenses, with possible delays and with the likelihood of divers opinions, was because he was certain that probably, or in any event finally, this court would be called upon to decide the question.

By this objection respondent has significantly given the reason why Congress felt, that in all justice and fairness, something should be done to protect railroad employees and accordingly passed the Federal Employers' Liability Act including venue, section 6.

This objection is of significance in showing the temper of the railroads generally toward their injured; and by its voluntary appearance, flagrantly in this case, where the respondent's employee, who can neither read nor write, was induced to sign a release for $8,000.00 for the loss of both legs near his hips due to the respondent's negligence. Said sum is about equal to his average wage and the cost of sustenance for himself, his wife and four children over a period of about two years.

II.

There is no issue of vital importance this court in exercising its discretion in petitioner's favor.

The respondent here urges dismissal of the petition herein because of lack of importance. It appears to us that its actions belie its words. We are impressed with the idea that if it did not consider this matter of the utmost importance it would not have employed attorneys, written a brief, and voluntarily submitted itself to the jurisdiction of this court. We cannot but be impressed with the vital importance of this matter where the welfare and well-being of over 1,300,000 families of railroad workers are, or may be, directly interested in the outcome, and where probably an equal number of

railroad officials, stock and bond holders are adversely interested. Except for tax, conscription and compulsory military training laws, we cannot now conceive of a matter of such vital importance to as many people.

This case is of vital public importance and of unusual character. However, great or vital, public importance is not a necessary prerequisite to permit this court to assume jurisdiction. In the case, *In re Chetwood*, Petitioner, 17 S. Ct. 385, 165 U. S. 443, decided February 15, 1897, this court said:

> "By Section 14 of the Judiciary Act of September 24, 1789 (1 Stat. 81, c. 20), carried forward as section 716 of the Revised Statutes [since carried forward as section 377 U.S.C.A. 1940 ed. and now section 1651, Title 28, U.S.C. effective September 1, 1948], this court and the Circuit Courts and District Courts of the United States were empowered by Congress 'to issue all writs not specifically provided for by statute, which may be agreeable to usages and principles of law'; and, under this provision, we can undoubtedly issue writs of certiorari in all proper cases. (citing) *Amer. Construction Company* v. *Jacksonville Railroad Company*, 148 U.S. 372, 380."
>
> "This court may issue writs of certiorari in all proper cases and will do so when the circumstances imperatively demand that form of interposition, to correct excesses of jurisdiction, and in the furtherance of justice."

The *Chetwood* case was a petition for the vacating of or prohibition upon certain orders of the District Court of the United States for the Northern District of California in the suit of *Stateler* v. *The California National Bank of San Francisco, et al.*, enjoining the bank and John Chetwood, Jr. from prosecuting a writ of error from this court in the name of the bank as plain-

tiff in error; directing Chetwood to dismiss a second writ of error from this court; and punishing Chetwood and his counsel as for contempt of court in suing out the writs. Leave was granted to file the petition, and rule to show cause was entered thereon to which return was made. In issuing the writ of certiorari the court said:

> "Although as observed in that case (*Amer. Construction Company* v. *Jacksonville Railroad Company* 148 U.S. 372, 380), this writ has not been issued as freely by this court as by the Court of the Queen's Bench, England, and prior to the Act of March 3, 1891 c. 517, 26 Stat. 826, had been ordinarily used as an auxiliary process merely, yet, when the circumstances imperatively demand that form of interposition the writ may be allowed, as at common law, to correct excesses of jurisdiction and in the furtherance of justice."

The court will note that in this case there was no vital public interest involved. In fact, the only people involved were the petitioner and people who had a personal interest in the bank. Vital public interest is not a prerequisite to this court assuming jurisdiction of the case at bar.

In the *Chetwood* case the court stated further, that:

> "Judgments in proceedings in contempt are not reviewable here on appeal or error but they may be reached by certiorari in the absence of any other adequate remedy."

As in the *Chetwood* case where there was no right of appeal from judgments in proceedings as of contempt of court, petitioner here had no right of appeal from the assumed discretionary order of Judge Wham and was without adequate remedy except by this or some such extraordinary proceeding.

We submit that in unusual or extraordinary proceedings, only important within themselves, the right of this court to assume jurisdiction has been firmly well-established for more than 40 years as expounded in the *Chetwood* case which has withstood the acid test of time.

III.

This court lacks jurisdiction to grant the relief requested, as the most the petition could possibly show as error is the exercise of judicial power, in their illegal seizure of judicial power by the District Courts.

Here the respondent urges that the petition be dismissed for lack of jurisdiction of this court. As we have covered this subject in the foregoing paragraph as well as in our original petition on page 6, we will not impose upon the court by arguing that subject further, except to say that by its voluntary appearance, not specially, not as *amicus curiae*, but generally, respondent has submitted to the jurisdiction of this court and waived the question of jurisdiction.

Respondent also urges that as a prerequisite to the allowance of petitioner's motion, he must show that Judge Wham's order in transferring his case was an "illegal seizure of judicial power by the District Court". This is not a necessary prerequisite; all petitioner need show is that Judge Wham exercised an excess of jurisdiction. (See *In re Chetwood* 165 U. S. 443.)

IV.

The power of this court is sought, not in aid of its appellate jurisdiction, but as a substitute for an appeal which is not permitted by statute.

Your petitioner seeks the protection of this court for the reason that he has no right of appeal and no other adequate remedy.

V.

Petitioner's contention that Federal Employers' Liability Act cases are not within the scope of Section 1404(a) of Title 28 United States Code is erroneous.

Respondent cites three district court cases in support of its contention that section 1404(a) permitting the transfer of any civil action to any other district or division where it might have been brought pertains to actions under the Federal Employers' Liability Act.

We desire at this time to call the Court's attention to the case of *Pascarella* v. *N. Y. Cent. R. Co.*, 81 Fed. Supp. 95, (N.Y.D.C.) where the Honorable Judge Rayfiel held that section 1404(a) was not applicable to actions brought under the Federal Employers' Liability Act.

This clearly shows that there is a substantial divergence of opinion by eminent jurists and indicates that this Court should allow petitioner's motion and finally settle the matter.

Respondent on page 12 of its brief, contends that when Congress desired to exempt cases under the Federal Employers' Liability Act it specifically did so as in Section 1445(a) of Title 28 U.S.C. which denied

the right of removal of such cases from state courts to federal courts. Instead of carrying the import that respondent attaches to it, we contend that this section shows that the tempest of Congress was to make certain that cases where railroad receivers and trustees are defendants could not be removed from a state to a District court of the United States. This strengthens our position, that Congress intended by this section to make doubly sure that railroad employees were protected as provided in section 6 of the Federal Employers' Liability Act, wherein it is specifically provided that there is no right of removal from a state to a federal court. (See Reviser's notes, section 1445 on page 1856 U.S.C. Congressional Service.)

On page 15 of its brief, respondent has seen fit to quote Professor Moore's views on the applicability of section 1404(a) to cases brought under the Federal Employers' Liability Act. We would like to call the Court's attention to chapter 87 of the Revised Judicial Code entitled "District Courts; Venue." In this chapter following the general venue provision[1] there are assembled special venue provisions, covering among other items, a provision relating to "patents and copyrights".[2] We contend that the venue provisions which were re-enacted in chapter 87 were all of the civil actions in which the Court is empowered to apply the doctrine of "*forum non conveniens*". It is significant to note no menton was made in this chapter concerning venue under the Federal Employers' Liability Act or under the Anti-Trust Laws. We believe it can be safely said that Professor Moore's note on page 2121—Note 107, contained in Volume 3, Moore's

[1] 28 U.S.C.A. 1391.
[2] Id. 1400.

Federal Practice (2nd edition), published December, 1948, wherein he states that:

> "Any action in section 1404(a) includes suits subject to special venue statutes, as suits for patent infringement and suits under the Federal Employers' Liabilty Act, as well as actions subject to the general venue statute",

is without foundation and is contrary to the well established rule that:

> "Where there are two statutes, upon the same subject, the earlier being special and the later general, the presumption is, in the absence of an express repeal or an absolute incompatibility, that the special is intended to remain in force as an exception to the general. (*Townsend* v. *Little*, 109 U. S. 504; 512; *Ex Parte Crow Dog*, id. 556, 570; *Rogers* v. *Texas*, 185 U. S. 83, 87-89.)"[1]

A careful study of the subject discloses that there is no mention of section 6 of the Federal Employers' Liability Act in chapter 87.

On page 17 of its brief, respondent contends that the failure of the passage of the Jennings Bill (H.R. 1639; 80th Congress) is not persuasive that section 1404(a) was intended to exclude civil actions under the Federal Employers' Liability Act. May we add to what we wrote in our original brief at page 21, that the Jennings Bill barely passed the House after heated and extended arguments and never reached the floor of the Senate. The purpose of this Bill was to displace section 6 of the Federal Employers' Liability Act. The Jennings Bill passed the House on July 17, 1947, just 10 days before the same House passed the revision containing section 1404(a) without debate. It is significant that not one word was

[1] Washington v. Miller, 235 U. S. 422, 428 (1914).

said to indicate that the House had just ten days prior thereto passed the revision containing section 1404(a). If Congress had actually intended to affect the venue provisions of the Federal Employers' Liability Act in the Judicial Code revision, some of the Congressmen would have suggested that the long and stormy debate on the Jennings Bill was unnecessary in view of the passing of the revision ten days earlier.

On page 16 of its brief, respondent contends that there was no repeal of section 6 of the Federal Employers' Liability Act by section 1404(a) by implication, but on the other hand contends that the action still may be brought in any district meeting the requirements of the special venue statute but states that such a case can then be removed at the discretion of any district court under the rule of *forum non conveniens*. Under such a rule injured railroad workers and their widows and orphans would have lost all of the rights and advantages that Congress has given them, step by step, over a period of 40 years. A careful study of the history of the enactment of section 1404(a) discloses no such intention on the part of Congress, but on the contrary, by not including section 6, of the Federal Employers' Liability Act under chapter 87 (the chapter fixing the venue in civil actions) Congress definitely showed their intention not to interfere or take away the rights of railroad employees which it had so arduously constructed.

In support of the foregoing, we again call the Court's attention to the opinion of the Honorable Judge Rayfiel, U. S. District Court; Eastern District, New York, 81 F. Supp. 95, where, on page 99, the court said:

> "The failure to make specific reference to Section 6 of the Federal Employers' Liability Act, or at least to include the said section in the aforemen-

tioned schedule or table of laws repealed, appears to confirm the opinion of this Court that it was not the intent of the Congress to make Section 1404(a) of the New Federal Judicial Code applicable thereto."

"The said Section 1404(a), except to the extent that it applies to those venue provisions contained in Chapter 87, aforementioned, merely makes statutory the doctrine of '*forum non conveniens.*' To make it applicable to actions under the Federal Employers' Liability Act would be to negative the aforementioned decisions of the Supreme Court, and I am unwilling to agree that that was the intent of the Congress."

"Granting venue rights under Section 6 of the Federal Employers' Liability Act was a meaningful and purposeful exercise of legislative prerogative by Congress, and should be taken away only by an equally specific discharge of its legislative function. I do not think that Section 1404(a) of the new code accomplished that purpose. * * *"

In respondent's last paragraph on page 17 of its brief is projected new matter. Here respondent contends that section 1404(a) should be applied to actions pending at the date it became effective, urging that the rule forbidding such application pertains only to statutes dealing with substantive rights and not to procedure.

We contend that this is not the rule but that venue provisions such as section 1404(a) are not retroactive. In the case of *Vaughan* v. *Empresas Hondurenas S A.* U. S. Court of Appeals, 5th Circuit (decided December 3, 1948) 171 F. 2d 46, the court held that

> Where a suit was filed and service made before effective date of the 1948 revision of the Judicial Code, the venue provisions were not applicable. 28 USCA 1391, *et seq.*

May we reiterate briefly the history of petitioner's case in Judge Wham's court? The facts are these: Petitioner's suit was filed in the District Court for the Eastern District of Illinois in October, 1947; was set for trial February 16, 1948 and was adjourned to the May term; at the May term (July, 1948) it was set for trial for November 1, 1948; on September 22, 1948, defendant filed its "Motion for Change of Venue"; on October 18, 1948 (13 days before the date set for trial, November 1, 1948) the court sustained defendant's motion and transferred the case, over petitioner's objection, to the Eastern District of Kentucky.

This case had been on the trial call of the Court for nearly a year, and was contemplated that it would proceed to trial in approximately 13 days. In fairness to the parties and in the interest of orderly administration of justice, a determination of the matter should not have been further delayed by the transfer.

Under the foregoing rule and history of petitioner's case, Judge Wham of the District Court exercised an excess of jurisdiction in entering his order to transfer petitioner's suit to a Kentucky Court. A reading of the order of Judge Wham (petitioner's brief, appendix 23) will reveal that in entering his order Judge Wham did not take into consideration the justice or fairness to the parties involved.

Wherefore, petitioner prays for the issuance of a writ of mandamus to the District Court for the Eastern District of Illinois, directing that it revoke and expunge from the record, its order of October 18, 1948, transferring said cause to the Eastern District of Kentucky, and for a writ of prohibition to the District Court for

the Eastern District of Kentucky, preventing it from proceeding with the trial of said cause on the grounds that it is without jurisdiction over said action; that certiorari issue and such further orders and relief as the Court deems meet in the premises.

Respectfully submitted,

JOSEPH COLLETT,

Petitioner.

LLOYD T. BAILEY,
325 Thompson Building,
Hot Springs, Arkansas

MICHAEL H. LYONS,
105 W. Madison Street,
Chicago 2, Illinois

THEODORE GRANIK,
1627 K Street, N. W.,
Washington, D. C.,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 206 Miscellaneous

Ex Parte JOSEPH COLLETT;

Petitioner

BRIEF OF THE RESPONDENT, HONORABLE FRED L. WHAM, UNITED STATES JUDGE FOR THE EASTERN DISTRICT OF ILLINOIS, IN OPPOSITION TO MOTION FOR LEAVE TO FILE PETITION FOR ORDER TO SHOW CAUSE WHY WRITS OF MANDAMUS AND PROHIBITION SHOULD NOT ISSUE.

ERNEST WOODWARD,
Attorney for the Respondent, Honorable Fred L. Wham, United States Judge for the Eastern District of Illinois,
1805 Kentucky Home Life Bldg.,
Louisville 2, Kentucky.

ROBERT P. HOBSON,
WOODWARD, HOBSON & FULTON,
Of Counsel.

WESTERFIELD-PONTE CO. INCORPORATED, LOUISVILLE, KY.

INDEX

	PAGE
STATEMENT	1
GROUNDS OF OPPOSITION TO THE MOTION	2
I. Petitioner Has Made No Prior Application for the Same Relief to the Court of Appeals for the Seventh Circuit and to the Court of Appeals for the Sixth Circuit	3
II. There Is No Issue of Vital Public Importance as to Warrant This Court in Exercising Its Discretion in Petitioner's Favor	6
III. This Court Lacks Jurisdiction to Grant the Relief Requested, as the Most the Petition Could Possibly Show as Error Is the Exercise of Judicial Power, Not Illegal Seizure of Judicial Power by the District Courts	7
IV. The Power of This Court Is Sought, Not in Aid of Its Appellate Jurisdiction, But as a Substitute for an Appeal Which Is Not Permitted by Statute	8
V. Petitioner's Contention That Federal Employers' Liability Act Cases Are Not Within the Scope of Section 1404(a) of Title 28 United States Code Is Erroneous	11
CONCLUSION	18

TABLE OF CASES CITED.

	PAGE
Baltimore & Ohio R. Co. v. Kepner, 314 U. S. 44	13, 15
Baltimore & P. R. Co. v. Grant, 98 U. S. 398	18
Benas v. Maher, 128 F. 2d 247 (C. C. A. 8th)	18
De Beers Consolidated Mines, Ltd. v. United States, 325 U. S. 212	5
Ex Parte Chicago, R. I. & Pac. R. Co., 255 U. S. 273, 279-80	8
Ex Parte Fahey, 332 U. S. 258, 260	6
Ex Parte Fred Benioff Co., 317 U. S. 594	5
Ex Parte Mars, Inc., 320 U. S. 17	5, 6
Ex Parte Peru, 318 U. S. 578	3, 4, 6, 8, 9
Ex Parte United States, 287 U. S. 241	5, 8, 9
Flippin v. U. S., 121 Fed. 742, 745 (C. C. A., 8th)	16
Gulf Oil Corp. v. Gilbert, 330 U. S. 501	7
Hallowell v. Commons, 239 U. S. 506	18
Hayes v. Chicago, Rock Island and Pacific R. Co., 79 F. Supp. 821 (D. C., Minn.)	11, 16, 17
Nunn v. Chicago, Milwaukee, St. Paul and P. R. Co., 80 F. Supp. 745 (S. D., N. Y.)	11, 14, 15, 17
Roche v. Evaporated Milk Association, 319 U. S. 21, 26-32	8, 9, 10
U. S. Alkali Export Association v. United States, 325 U. S. 196	5, 8
U. S. v. Hartwell, 73 U. S. 385	16
United States v. National City Lines, Inc., 334 U. S. 573	9
U. S. v. National City Lines, 80 F. Supp. 734 (S. D., Calif.)	11, 12, 16
United States v. State of Arizona, 295 U. S. 174, 191	16
U. S. v. Windle, 158 Fed. 196, 199 (C. C. A., 8th)	16

OTHER AUTHORITIES CITED.

PAGE

Federal Employers' Liability Act (45 U. S. C. A. 51-60) 2, 7, 16, 17

Federal Rules of Criminal Procedure Rule 21(b) 9

House Report, No. 308, 80th Cong., 2d Session, 28 U. S. C., Congressional Service, pp. 1692, 1693 12

Moore's Fed. Practice (Second Edition), Vol. 3 15

Sherman Act:

Section 4 (15 U. S. C. A. 29) 5

Senate Report 1559, 80th Cong., 2d Session, 28 U. S. C., Congressional Service, pp. 1675, 1676 12

United States Code:

Title 28, Section 1404(a) 3, 7, 11, 12, 13, 15, 16, 17

Title 28, Section 1651 8

Title 28, Section 1291 9

Title 28, Section 1445(a) 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 206 Miscellaneous

Ex Parte JOSEPH COLLETT,

Petitioner

BRIEF OF THE RESPONDENT, HONORABLE FRED L. WHAM, UNITED STATES JUDGE FOR THE EASTERN DISTRICT OF ILLINOIS, IN OPPOSITION TO MOTION FOR LEAVE TO FILE PETITION FOR ORDER TO SHOW CAUSE WHY WRITS OF MANDAMUS AND PROHIBITION SHOULD NOT ISSUE.

STATEMENT.

By his motion for leave to file a petition for a writ of mandamus to the Honorable Fred L. Wham, United States Judge for the Eastern District of Illinois, and for a writ of prohibition to the Honorable H. Church Ford, United States District Judge for the Eastern District of Kentucky, petitioner desires to have this Court review an order of the United States District Court for the Eastern District of Illinois, entered October 18, 1948. This order (Appendix to Petition, page 23) granted in the exercise of the Court's judicial dis-

cretion the defendant's, Louisville & Nashville Railroad Company's motion to transfer the trial of this action to the United States District Court for the Eastern District of Kentucky at Lexington, Kentucky. Judge Ford, of the Eastern District of Kentucky, assigned the case for trial within that district to Richmond, Kentucky. Petitioner states in his memorandum in support of the motion that he is a resident of Irvine, Kentucky, where the accident occurred, which is approximately 26 miles from Richmond, Kentucky. The accident resulted in an action under Federal Employers' Liability Act (45 U. S. C. A. 51-60) to recover damages in the sum of $150,000.

The petitioner seeks to secure this Court's jurisdiction directly. The petitioner has not applied for mandamus against Judge Wham in the Court of Appeals for the Seventh Circuit, and he has not petitioned the Court of Appeals for the Sixth Circuit for a writ of prohibition directed to Judge Ford.

GROUNDS OF OPPOSITION TO THE MOTION.

Respondent opposes this motion on the following grounds:

I. Petitioner has made no prior application for the same relief to the Court of Appeals for the Seventh Circuit and to the Court of Appeals for the Sixth Circuit.

II. There is no issue of vital importance as to warrant this Court in exercising its discretion in petitioner's favor.

III. This Court lacks jurisdiction to grant the relief requested, as the most the petition could possibly show as error is the exercise of judicial power, not illegal seizure of judicial power by the District courts.

IV. The power of this Court is sought, not in aid of its appellate jurisdiction, but as a substitute for an appeal which is not permitted by statute.

V. Petitioner's contention that Federal Employers' Liability Act cases are not within the scope of Section 1404(a) of Title 28, United States Code, is erroneous.

I. Petitioner Has Made No Prior Application for the Same Relief to the Court of Appeals for the Seventh Circuit and to the Court of Appeals for the Sixth Circuit.

Assuming for the purposes of argument that this Court had jurisdiction under 28 U. S. C. 1651(a) to grant this motion for leave to file a petition for writ of mandamus or prohibition, the petitioner's motion made prior to any application to the Court of Appeals for the Seventh and Sixth Circuits should be denied. This Court has stated the rule distinctly and correctly in *Ex Parte Peru*, 318 U. S. 578, p. 584:

> "The common law writs, like equitable remedies, may be granted or withheld in the sound discretion of the Court. *Re Skinner & E. Corp.*, 265 U. S. 86, 95, 96, 68 L. Ed. 912, 915, 44 S. Ct. 446; *Ex parte Monterey*, 269 U. S. 527, 70 L. ed. 395, 46 S. Ct. 16; *Maryland v. Soper*, 270 U. S. 9, 29, 70 L. ed. 449, 456, 46 S. Ct. 185; *United States ex rel. Greathouse v. Dern*, 289 U. S. 352, 359,

77 L. ed. 1250, 1254, 53 S. Ct. 614; and are usually denied where other adequate remedy is available. *Ex Parte Baldwin*, 291 U. S. 610, 78 L. ed. 1020, 54 S. Ct. 551, 24 Am. Bankr. Rep. (N. S.) 487. And ever since the statute vested in the circuit courts of appeals appellate jurisdiction on direct appeal from the district courts, this Court, in the exercise of its discretion, has in appropriate circumstances declined to issue the writ to a district court, but without prejudice to an application to the circuit court of appeals (*Ex parte Apex Electric Mfg. Co.*, 264 U. S. 725, 71 L. ed. 1342, 47 S. Ct. 766; *Ex Parte Daugherty*, 282 U. S. 809, 75 L. ed. 726, 51 S. Ct. 180; *Ex Parte Krentler-Arnold Hinge Last Co.*, 286 U. S. 533, 76 L. ed. 1273, 52 S. Ct. 621), which likewise has power under §262 of the Judicial Code, 28 U. S. C. A. §377, 8 F. C. A. title 28, §377 to issue the writ. McClellan v. Carland, 217 U. S. 268, 54 L. ed. 762, 30 S. Ct. 501; *Adams v. United States*, 317 U. S. 269, *ante*, 268, 63 S. Ct. 236, 143 A. L. R. 435."

The same rule in this particular is applicable to both writs of mandamus and writs of prohibition. *Ex Parte Peru, supra*, p. 584. In the *Peru* case the Court granted the motion for leave to file a petition for a writ prior to application in the Court of Appeals, but the Court made it clear that it was only in cases of great public importance and exceptional character that such action would be taken. In the *Peru* case there was a clash between the executive branch of the Government, which had certified sovereign immunity, and the judicial branch, which had refused to recognize the

certification. Here there is no such conflict and no extraordinary circumstances presented. Therefore, it is submitted that a motion for leave to file the petition should be denied as there is a more appropriate procedure available. *Ex parte Mars, Inc.*, 320 U. S. 17; *Ex Parte Fred Brandoff Co.*, 317 U. S. 594; see *Ex Parte United States*, 287 U. S. 241, pp. 248-49.

In *U. S. Alkali Export Association* v. *United States*, 325 U. S. 196, and the *De Beers Consolidated Mines, Ltd.*, v. *United States*, 325 U. S. 212, suits of an equitable nature by the United States under Section 4 of the Sherman Act (15 U. S. C. 4); petitions for writs of certiorari to the District Courts in the first instance were allowed by this Court because sole appellate jurisdiction lay in this Court under Section 29 of the Act. (15 U. S. C. A. 29). Therefore, in this action the Court correctly stated in the *Alkali Export Association, supra*, case, p. 202, that "application for the common law writ in aid of appellate jurisdiction must be to this Court." However, Chief Justice Stone reaffirmed the rule of *Ex Parte Peru* as applicable in all cases of which this Court does not have *sole* appellate jurisdiction:

> "In the usual case this Court will decline to issue a writ prior to review in the Circuit Court of Appeals, whether by ordinary appeal (In *re Tampa Suburban R. Co.*, 168 U. S. 583, p. 588) or by extraordinary remedy (*Ex Parte Peru, supra*, p. 584)."
>
> *U. S. Alkali Export Association, Inc.*, v. *United States, supra*, p. 202.

Since the present case is one in which both this Court and the Court of Appeals for the Sixth and Seventh Circuits have appellate jurisdiction, the rule as stated in *Ex Parte Peru, supra,* is applicable, and application should first be made to the respective Courts of Appeals.

II. There Is No Issue of Vital Public Importance as to Warrant This Court in Exercising Its Discretion in Petitioner's Favor.

Conceding for the purpose of argument this Court's jurisdiction, the petitioner's motion for leave to file a petition for these two common law writs should be denied upon the ground that the petitioner does not show that he is entitled to the relief requested.

The only effect of the order of transfer is that the petitioner will present his cause of action to a Federal Court and jury in Richmond, Kentucky, rather than East St. Louis, Illinois. It is difficult to understand how the petitioner will be prejudiced in any legal sense by this transfer. It would appear obvious that he may be able to subpoena necessary witnesses for the trial in Richmond, Kentucky, whose presence could not be secured at a trial in East St. Louis, Illinois. From any viewpoint taken, the petitioner's motion does not present a really extraordinary cause which would entitle him to the drastic and unusual remedy sought herein. *Ex parte Fahey,* 332 U. S. 258, 260; *Ex parte Mars, Inc.,* 320 U. S. 710.

III. This Court Lacks Jurisdiction to Grant the Relief Requested, as the Most the Petition Could Possibly Show as Error Is the Exercise of Judicial Power, Not Illegal Seizure of Judicial Power by the District Courts.

The petitioner in his motion for leave to file the petition for these extraordinary remedies maintains that the action of the District Court for the Eastern District of Illinois is void (Petition, page 2). This conclusion is based on the petitioner's conclusion that the order from the Eastern District of Illinois was based on the hypothesis that Section 1404(a), Title 28 U. S. C., effective September 1, 1948, amended, repealed and superseded Section 6 of the Federal Employers' Liability Act, Section 56, Title 45 U. S. C. A. Petitioner argues that Section 1404(a) of Title 28 U. S. C., giving discretion to the District Court to transfer "any civil action" for the convenience of the parties and witnesses and in the interest of justice to any other districts where it might have been brought, has no application whatever to a civil action brought under the Federal Employers' Liability Act.

In brief, it is the petitioner's contention that the application of the doctrine of "*forum non conveniens*" is not placed in effect by the new statute. However, prior to September 1, 1948, it must be conceded that Judge Wham would have had the judicial power to dismiss this action on the ground of "*forum non conveniens*," even though such a decision would have been erroneous. *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, p. 505, and cases cited therein. Thus, the conclusion

seems undeniable that the petitioner's complaint is not concerned with the illegal seizure of power by the District Court, but merely with an alleged misconstruction of a statute in the exercise of conceded judicial power. See *Ex parte United States*, 287 U. S. 241, 249. Therefore, this Court lacks jurisdiction as we have a question of judicial discretion, and the relief requested should be denied on this ground alone. *Ex parte Chicago, R. I. & Pac. R. Co.*, 255 U. S. 273, 279-80; *Roche* v. *Evaporated Milk Association*, 319 U. S. 21, 26-32; *United States Alkali Export Association, Inc.* v. *United States*, 325 U. S. 196, 202 (see *Ex parte United States, supra*, page 249).

IV. The Power of This Court Is Sought, Not in Aid of Its Appellate Jurisdiction, But as a Substitute for an Appeal Which Is Not Permitted by Statute.

Sec. 1651(a), Title 28, U. S. C., covers the jurisdiction of this Court to issue all writs as follows:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions agreeable to the usages and principles of law."

The statutory authority of this Court to issue writs of mandamus or prohibition to District Courts can be exercised only if such writs are in aid of appellate jurisdiction. *Ex parte Peru*, 318 U. S. 578, 582; *Ex parte United States*, 287 U. S. 241, 248-49. This Court, in addition, has the power to issue the writ although a direct appeal is allowed to the Court of Appeals, if

this Court has ultimate jurisdiction by certiorari. *Ex parte Peru, supra*, 584-85; *Ex parte United States, supra*, page 248.

These rules do not cover the Court's jurisdiction in this case for the Court of Appeals for the Sixth and Seventh Circuits are not vested by statute with direct appellate jurisdiction over this order of transfer. Therefore, it is outside the power of this Court to act in aid of an appellate jurisdiction that likewise could not exist. The order here entered by the District Court for the Eastern District of Illinois merely transferred the trial of this action to Kentucky. The order is not final in any respect as regards the merits of the case. Thus, the Court of Appeals for the Seventh Circuit and the Sixth Circuit would be without appellate jurisdiction, since it may only review, with exceptions not here material, "appeals from final decisions of the District Court, except where a direct review may be had in a Supreme court." 28 U. S. C. 1291. See *Roche v. Evaporated Milk Association*, 319 U. S. 21, 29-30.

In criminal actions this Court has recognized the non-appealability of such a transfer order. In *United States v. National City Lines, Inc.*, 334 U. S. 573, at 594, where an order of transfer had been entered pursuant to Rule 21(b) of the Federal Rules of Criminal Procedure, Mr. Justice Rutledge stated:

> "Moreover, it is at least doubtful whether the Government had a right to appeal from the order of transfer in the criminal case." See also *Seuel v. United States*, 158 F. 2d 231, 232.

Therefore, the petitioner is attempting to suggest to this Court that it substitute mandamus for an appeal contrary to the statutes and policy of Congress. *Roche* v. *Evaporated Milk Association*, 319 U. S. 21, 32.

As the Court stated in the Roche case, *supra*, at page 30:

> "Where the appeal statutes establish the conditions of appellate review, an appellate court cannot rightly exercise its discretion to issue a writ whose only effect would be to avoid those conditions and thwart the Congressional policy against piecemeal appeals in criminal cases. *Cobbledick* v. *United States*, 309 U. S. 323. As was pointed out by Chief Justice Marshall, to grant the writ in such a case would be a 'plain evasion' of the Congressional enactment that only final judgments be brought up for appellate review. 'The effect therefore of this mode of interposition would be to retard decisions upon questions which were not final in the court below, so that the same cause might come before this Court many times before there would be a final judgment.' *Bank of Columbia* v. *Sweeny*, 1 Pet. 567, 569. See also *Life & Fire Insurance Co.* v. *Adams*, 9 Pet. 573, 602; *Ex parte Hoard*, 105 U. S. 578, 579-80; *American Construction Co.* v. *Jacksonville, T. & K. W. Ry. Co.*, 148 U. S. 372, 379."

V. Petitioner's Contention That Federal Employers' Liability Act Cases Are Not Within the Scope of Section 1404(a) of Title 28 United States Code Is Erroneous.

The respondent maintains that Section 1404(a) of Title 28, U. S. C., effective September 1, 1948, permitting the transfer of any civil action to any other District or Division where it might have been brought pertains to actions under the Federal Employers' Liability Act. The respondent rests his case on reasoning and logic of the following three opinions:

Nunn v. *Chicago, Milwaukee, St. Paul and P. R. Co.*, 80 F. Supp. 745 (S. D., N. Y.).

U. S. v. *National City Lines*, 80 F. Supp. 731 (S. D., Calif.).

Hayes v. *Chicago, Rock Island and Pacific R. Co.*, 79 F. Supp. 821 (D. C., Minn.).

The crux of this question is what is the meaning of the term "any civil action" as used in 1404(a) of Title 28, U. S. C. The respondent submits that from the clear and unambiguous language of the statute as well as its purpose, and from the reviser's notes coupled with the legislative history, actions under the Federal Employers' Liability Act are included within this term.

Section 1404(a) of Title 28, U. S. C., is a segment of the New Judicial Code. The purpose of the Code, as shown by the Report of House and Senate Judiciary Committee, was not to amend existing acts but to revise the entire Judicial Code to where it was to speak authoritatively as the law and not presumptively. Senate

Report 1559, 80th Cong. 2d Session, 28 U. S. C., Congressional Service, pages 1675, 1676. House Report No. 308, 80th Cong., 2d Session, 28 U. S. C., Congressional Service, pages 1692, 1693. House Report No. 308, 80th Cong., 1st Session, Professor James W. Moore's statement before House Judiciary Committee, 28 U. S. C. Congressional Service, pages 1967, 1968. In accomplishing his purpose a new jurisdictional and procedural system was enacted that did not exist before, and as a part of this system a new procedural method was added permitting the transfer of cases from one district to another. *U. S. v. National City Lines,* 80 F. Supp. 734, 737 (S. D., Calif.). In order to create uniformity of expression with the Federal Rules of Civil Procedure all-inclusive terms were dropped in favor of the single term "any civil action."

In enacting this new provision the legislative history is conclusive that the provisions of Section 1404(a) were to include Federal Employers' Liability cases. When Congress desired to exempt case under the Employers' Liability Act it specifically did so as in Section 1445(a) of Title 28, U. S. C., denying the right of removal from State Courts to Federal Courts. Attached to the Report submitted by the Committee on Judiciary of the House of Representatives (H. Report 308, 80th Congress, 1st Session, April 25, 1947, 28 U. S. C., Congressional Service, page 1692), were the reviser's notes which explained the sources of the law and changes made in codification. S. Report No. 1559, 80th Cong., 2d Session, June 9, 1948, page 2, 28 U. S. C., Congressional Service, page 1675. In attempting to

show the need for Section 1404(a), which incorporated the doctrine of "*forum non conveniens*," the reviser cited *Baltimore & Ohio R. Co.* v. *Kepner*, 314 U. S. 44, a case under the Federal Employers' Liability Act, in the following words:

> "Subsection (a) was drafted in accordance with the doctrine of *forum non conveniens*, permitting transfer to a more convenient forum, even though the venue is proper. As an example of the need of such a provision, see *Baltimore & Ohio R. Co.* v. *Kepner*, 1941, 62 S. Ct. 6; 314 U. S. 44, 86 L. Ed. 28, which was prosecuted under the Federal Employers' Liability Act in New York, although the accident occurred and the employee resided in Ohio. The new subsection requires the court to determine that the transfer is necessary for convenience of the parties and witnesses, and further, that it is in the interest of justice to do so." 28 U. S. C., Congressional Service, page 1853.

The reference to this Court's opinion was not a coincidence. The history of the reviser's notes shows without the shadow of a doubt that Section 1404(a) was tailored to fit the situation here presented and to give the District Court discretion to transfer the case in the interest of justice. The Second Draft of the Code, together with the reviser's notes, had been circulated during 1945 to the Advisory Committee, the Judicial Conference Committee, the Judicial Consultant, Judge Parker; Special Consultants, Judge Holtzoff and Professor James W. Moore, as well as to every member of the Congress. Those directly con-

nected with the revision met in Hershey, Pennsylvania, in May of 1945 and discussed the matter of the New Code, section by section, in a very careful manner. Statement of Hon. Albert B. Maris, U. S. Circuit Judge for the Third Circuit, before Subcommittee 1 of the House Judiciary Committee, March 7, 1947, 28 U. S. C., Congressional Service, page 1958. The reviser's note as attached to the Second Draft was as follows:

> "Subsection (a) is new. It was drafted in accordance with a memorandum of Mar. 7, 1945, from the author of Moore's Federal Practice, stating that recognition should be given the doctrine of *'forum non conveniens'* permitting transfer to a more convenient forum, even though the venue is proper. The author gave as an example for the need of such a provision *Baltimore & Ohio R. Co.* v. *Kepner*, 1941, 62 S. Ct. 6, 314 U. S. 44, 86 L. Ed. 28, which was prosecuted under the Federal Employers' Liability Act in New York, although the accident occurred and the employee resided in Ohio. The new subsection requires the court to determine that the transfer is necessary for convenience of the parties and witnesses, and further, that it is in the interest of justice to do so."

There is no doubt that the reviser's notes were directed to the attention of the Congress. *Nunn* v. *Chicago, Milwaukee, St. P. and Pac. R. Co.*, 80 F. Supp. 745 (S. D. N. Y.) at 747, and citations.

It is Professor Moore's view that the case here presented is within the provisions of §1404(a). In Volume

3, Moore's Fed. Practice (Second Edition), published December, 1948, the author states as follows:

§19.04, page 2141:

"The Judicial Code Revision did not change the underlying basic principles of venue. It did, however, make some substantial changes and certainly put venue on a more workable basis. It adopts the principle of *forum non conveniens*, but provides for a transfer, not dismissal, of any action to a proper and more convenient forum."

Page 2141—Note 107:

"Any action in §1404(a) includes suits subject to special venue statutes, as suits for patent infringement and suits under the Federal Employers' Liability Act, as well as actions subject to the general venue statute."

This explanation of the citation to the *Kepner* case in the reviser's note, buttressed by the clear language of Section 1404(a), conclusively shows the Congressional intent to include civil actions under the Federal Employers' Liability Act within the provisions of that section. The Congress has deemed the holding of this Court in *Baltimore & Ohio R. Co. v. Kepner*, 314 U. S. 44, unfair and has followed this Court's suggestion at page 54 in the same case by enacting appropriate legislation establishing the doctrine of *forum non conveniens*. *Nunn* v. *Chicago, Milwaukee, St. P. & P. R. Co.*, 80 F. Supp. 745, at 747 (S. D., N. Y.).

This interpretation of Section 1404(a) in no way conflicts with Section 6 of the Employers' Liability

Act (Sec. 56, Title 45, U. S. C. A.) as Section 6 merely states where the action "may be brought," but it does not provide it must remain there. Thus, there is no inconsistency between the two acts (*Numn* case, *supra*, 747), and the new section does not take away any of the rights of the special venue statute permitting "forum shopping." *U. S.* v. *National City Lines, supra*, p. 740-741. An action may still be brought in any district meeting the requirements of the special venue statute, and the burden is then on defendant to establish its right to transfer. *Hayes* v. *Chicago, R. I. & P. R. Co.*, 79 F. Supp. 821, at 825 (D. C., Minn.). Thus, Section 1404(a) does not as a matter of right grant defendant the right to transfer.

There has been no repeal of Section 6 of the Employers' Liability Act (Sec. 56, Title 45, U. S. C. A.) by implication, and the cases cited by the petitioner that a general statute does not repeal a specific statute are not in point. Section 1404(a) can be fitted into the existing scheme, and this Court should so construe it if possible. *United States* v. *State of Arizona*, 295 U. S. 174, 191. But the purpose of this rule is to give effect to the presumed intention of the law-making body when its intent cannot be shown from other evidence. The primary rule of statutory construction requires the ascertaining of the legislative intent and to give it effect. *U. S.* v. *Hartwell*, 73 U. S. 385; *Flippin* v. *U. S.*, 121 Fed. 742, 745 (C. C. A., 8th); *U. S.* v. *Windle*, 158 Fed. 196, 199 (C. C. A., 8th). When that can be ascertained as in this case, the rule does not prevail. *U. S.* v. *National City Lines*, 80 F. Supp. 734, 740 (S. D., Calif.); and cases cited.

It is also submitted that failure of Congress to enact the Jennings Bill is not persuasive that Section 1404(a) was intended to exclude civil actions under the Federal Employers' Liability Act. The Jennings Bill was in no way an enactment of the doctrine of *forum non conveniens*, but it required suit to be brought in the jurisdiction in which the cause of action arose, or in which the person suffering death or injury resided at the time it arose, and withdrew from plaintiff any choice of forum except where defendant could not be reached with process in either of the two above situations. No such provision is contained in Section 1404(a). Under Section 6 of the Federal Employers' Liability Act (Sec. 56, Title 45 U. S. C. A.) the plaintiff may still select any forum he is permitted under the special statute, but once he is there he is under the power of the Court after considering all the facts to determine whether that is the most suitable place for trial. *Nunn* v. *Chicago, Milwaukee, St. P. & P. R. Co., supra*, p. 748; *Hayes* v. *Chicago, R. I. & P. R. Co., supra*, p. 825. This is an entirely different provision than that incorporated in the Jennings Bill, and the refusal of Congress to enact it does not mean that Section 1404(a) was not to apply to Federal Employers' Liability civil actions in District Courts.

In conclusion, respondent urges that Section 1404(a) should be applied to actions pending at the date it became effective as the rule forbidding such application pertains only to statutes dealing with substantive rights and not to procedure. Matters of venue and changes of venue are incidents of procedure and remedies, and statutes relating to them operate in retro-

spect. *Baltimore & P. R. Co.* v. *Grant*, 98 U. S. 398; *Hallowell* v. *Commons*, 239 U. S. 506; *Benas* v. *Maher*, 128 F. 2d 247 (C. C. A. 8th).

CONCLUSION

Petitioner's motion for leave to file a petition for a writ of mandamus to the Honorable Fred L. Wham, United States District Judge for the Eastern District of Illinois, East St. Louis, Illinois, should be denied, and the petitioner's motion for leave to file a petition for a writ of prohibition directed to the Honorable H. Church Ford, United States District Judge for the Eastern District of Kentucky, should be denied.

Dated: Louisville, Kentucky, January 25, 1949.

ERNEST WOODWARD,
Attorney for the Respondent, Hon. Fred L. Wham, United States Judge for the Eastern District of Illinois,
1805 Kentucky Home Life Bldg.,
Louisville 2, Ky.

ROBERT P. HOBSON,
WOODWARD, HOBSON & FULTON,
Of Counsel.